U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-E-S- LLC

DATE: AUG. 6, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a strategy consulting firm, seeks to employ the Beneficiary as a senior energy analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on multiple grounds. The Director found that the Petitioner willfully misrepresented a material fact in the labor certification regarding a familial relationship between the Petitioner and the Beneficiary and invalidated the labor certification on that basis.[1] The Director then denied the petition on the ground that it was not supported by a valid labor certification. In addition, the Director found that the Petitioner did not establish that the Beneficiary had the experience required for the offered job. We dismissed a subsequent appeal. *Matter of C-E-S-LLC,* ID# 1943213 (AAO Dec. 6, 2018).

Although we found that the Petitioner had established the Beneficiary's qualifying experience, we determined that the Petitioner had not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we did not reinstate the validity of the labor certification and did not disturb the Director's decision to deny the petition for lack of a valid labor certification. We also concluded that the Petitioner had not established its continuing ability to pay the proffered wage from the priority date onward.

On motion to reopen and reconsider, the Petitioner submits additional evidence and asserts that its inadvertent error on the labor certification was due to ineffective assistance of counsel; that the

[1] The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part:

> Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Petitioner did not willfully misrepresent a material fact on the labor certification; and that the Petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

Upon review, we will deny the motion to reopen and deny the motion to reconsider.

I. MOTION REQUIREMENTS

A petitioner must meet the formal filing requirements of a motion and show proper cause for granting the motion. 8 C.F.R. § 103.5(a)(1). A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that meets these requirements and establishes eligibility for the benefit sought.

II. ANALYSIS

The first issue is whether the Petitioner willfully misrepresented a fact on the labor certification regarding a familial relationship with the Beneficiary. The second is whether the Petitioner established its continuing ability to pay the proffered wage.

A. Validity of the Labor Certification

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a petition for advanced degree professional classification generally must be accompanied by an individual labor certification from the Department of Labor (DOL). A petition that lacks a required individual labor certification is not considered properly filed. *See id.*

In this case, the Petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." Part C.9 on the ETA Form 9089, Application for Permanent Labor Certification, also asked: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The Petitioner responded: "No."

In a notice of intent to deny (NOID), the Director cited information in the Petitioner's website that the Petitioner's founder and president is the Beneficiary's brother, which contradicted the denial on the labor certification of any familial relationship between the Petitioner and the Beneficiary.[2] In response to the NOID, the Petitioner acknowledged the familial relationship between the Petitioner and the Beneficiary and asserted that Part C.9. was "inadvertently and unintentionally marked incorrectly."

[2] The Petitioner is organized as a limited liability company in the Commonwealth of Massachusetts. Massachusetts corporate online records show that [redacted] is the manager and organizer of the Petitioner. Mass. Sec'y State, Corps. Div., http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=[redacted]&SEARCH_TYPE=1 (last visited July 19, 2019). The Petitioner's tax returns also indicate that [redacted] is the sole member. The record does not contain the Petitioner's Articles of Organization, so it is unclear if [redacted] is also designated at the Petitioner's President.

The Petitioner asserted that there was nevertheless a *bona fide* job opportunity for U.S. workers and submitted documentary evidence of the Petitioner's recruitment efforts. After reviewing the Petitioner's response, the Director found that the Petitioner willfully misrepresented a material fact, invalidated the labor certification, and denied the petition. We dismissed the subsequent appeal.

For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289 (BIA 1975).

In this case, the Petitioner asserts on motion that its representation at Part C.9. was not false, but was instead a "mistaken representation." We disagree. The Beneficiary is the brother of the Petitioner's manager, organizer, and sole member; therefore, the answer to C.9. is false because a familial relationship exists between the Beneficiary and the Petitioner.

Second, on motion, the Petitioner asserts that its representation was not willful. We disagree. The labor certification was signed by the Petitioner below a declaration reading:

> I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate.

The Petitioner's signature on the labor certification establishes a strong presumption that it knew the contents of the labor certification application and assented to them. *See Hanna v. Gonzales*, 128 F. App'x 478, 480 (6th Cir. 2005) (stating that "the law… charges [an applicant] with knowledge of the application's contents").[3] On motion, the Petitioner cites a recent decision by the Board of Immigration Appeals (Board), *Matter of A.J. Valdez and Z. Valdez*, 27 I&N Dec. 496 (BIA 2018), and states that while the signature of the Petitioner on the labor certification creates a strong presumption that it assented to the contents of the labor certification, it can rebut the presumption by establishing fraud, deceit, or other wrongful acts by another person. *Id.* at 499. Here, the Petitioner asserts that ineffective assistance of counsel was the "core reason" for its inadvertent error on the labor certification.

According to *Matter of A.J. Valdez and Z. Valdez,* we must evaluate the explanations and consider the facts of the particular case to determine whether the Petitioner has rebutted the presumption of knowledge of the document's contents. *See id; Zhi Wei Pang v. BCIS*, 448 F.3d 102, 107–08 (2d Cir. 2006). Here, the Petitioner's claim of ineffective assistance of counsel, even if valid,[4] is not sufficient

[3] *See also, e.g., U.S. v. Baptist*, 759 F.3d 690, 696 (7th Cir. 2014) (holding that the failure to read a waiver form containing clear warnings of its consequences was insufficient to prove that the waiver was invalid, absent evidence that the signer was tricked or pressured into signing it); *cf. Bingham v. Holder*, 637 F.3d 1040, 1045 (9th Cir. 2011) (stating that in the absence of fraud or other wrongful act on the part of another, a person who signs a contract is presumed to know its contents and to assent to them).

[4] The Board's decision in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

to rebut the presumption that it assented to the answer at Part C.9.of the labor certification. The Board stated in *Matter of A.J. Valdez and Z. Valdez* that an applicant or petitioner:

> … may not deliberately avoid reading the application or having it explained or translated in an attempt to circumvent the presumption. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) (noting "the general principle that '[o]ne who has executed a written contract and is ignorant of its contents cannot set up that ignorance to avoid the obligation absent fraud and misrepresentation'" (citation omitted)); *cf. United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (holding that "a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein").

In this case, the Beneficiary had worked for the Petitioner in the United States since 2008, and he is the brother of the Petitioner's organizer/sole member/manager, [redacted][5] Given the nature the Beneficiary's personal and business relationship to the Petitioner and the significance of the labor certification to his continued employment in the United States, it is reasonable to expect that the Petitioner would take steps to ascertain the accuracy of documents it signed. As noted, the Petitioner signed the labor certification application attesting to the fact that it reviewed the application and that the facts were true and correct. Counsel's purported error in the preparation of a form that was later reviewed and signed under penalty of perjury by the Petitioner does not constitute "fraud, deceit, or other wrongful acts by another person," such that the Petitioner may be absolved of its responsibility for the truthfulness of the information provided. *See Matter of A.J. Valdez and Z. Valdez*, 27 I&N Dec. at 499.

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel, the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions. On motion, the Petitioner submits an affidavit from its founder, manager, and owner, [redacted] attesting to the relevant facts.

- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel should be submitted with the claim. On motion, the Petitioner submits an affidavit from the Petitioner's former counsel stating that it prepared the labor certification and checked "no" to Part C.9., despite knowing about the familial relationship between the Petitioner and the Beneficiary. He states that the incorrect response was "inadvertent and made without any intent to mislead or deceive" but that he "did not notice the error during [his] review of the form."

- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities or an explanation why the petitioner did not file a complaint. In its affidavit submitted on motion, the Petitioner asserts that it does not plan to file a bar complaint against its former attorney because of its long history of working with the attorney; its desire to not undermine his law practice; and the attorney's willingness to describe the error in the affidavit in the record.

[5] We note that the Petitioner's website lists the Petitioner's Vice President as [redacted] who is also the Beneficiary's brother according to government records. Thus, it appears that at least three of the Petitioner's six employees are related. [redacted] (last visited July 19, 2019). Further, all of the documents submitted with the original petition that contained the Petitioner's signature were signed by an unrelated project manager [redacted] instead of [redacted] These documents included the petition, the labor certification, a supporting letter, and an employment verification letter. The record does not indicate why and under what authority all of these documents were signed by a project manager instead of one of the two leaders of the Petitioner.

Third, on motion, the Petitioner asserts that the misrepresentation is not material to the Beneficiary's eligibility. A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980).[6] The petitioner has the burden of establishing that a *bona fide* job opportunity exists when it is asked to show that the job is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361; 20 C.F.R. § 656.17(l). The Beneficiary is the brother of the Petitioner's organizer/sole member/manager and is one of only six employees according to the labor certification and the petition. By withholding information about the familial relationship, the Petitioner shut off a line of inquiry by the DOL that was relevant to the Beneficiary's eligibility for the requested classification of advanced degree professional.

Based on the foregoing analysis, the Petitioner's answer of "No" to the question at C.9 of the labor certification was a willful misrepresentation of fact because it denied the true familial relationship between the Petitioner and the Beneficiary. The misrepresentation was material to the question of whether the position of senior energy analyst was a *bona fide* job opportunity open to U.S. workers because it shut off a line of inquiry to the DOL. Accordingly, the Petitioner has not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not reinstate the validity of the labor certification and will not disturb the Director's decision to deny the petition for lack of a valid labor certification.

B. Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. The record contains copies of the Forms W-2, Wage and Tax Statements, issued to the Beneficiary by the Petitioner for the years 2013 to 2016. They show that the Beneficiary's gross pay exceeded the proffered wage in each of these years. The record also contains the Petitioner's federal income tax returns for 2013 to 2017. The Petitioner has established its continuing ability to pay the proffered wage from the priority date onward. Therefore, we will withdraw this portion of our decision.

III. CONCLUSION

Although the Petitioner has established its continuing ability to pay the proffered wage, it has not overcome the Director's findings that the Petitioner willfully misrepresented a material fact involving the labor certification process. Therefore, we will not reinstate the validity of the labor certification and will not disturb the Director's decision to deny the petition for lack of a valid labor certification.

The motion to reopen and motion to reconsider will be denied for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

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[6] *See also U.S. v. Boffil-Rivera*, 607 F.3d 736, 741 (11th Cir. 2010) (finding that a misrepresentation is material when it has a natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed).

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-E-S- LLC*, ID# 3979298 (AAO Aug. 6, 2019)